Etiqa General Takaful Bhd v Mohd Khairul Irman bin Mohd Zin & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-611–11 OF 2023
ATAN MUSTAFFA J
20 DECEMBER 2024

Insurance — Motor insurance — Policy of insurance — Third defendant filed civil action against first and second defendants for occurrence of road traffic accident — Plaintiff as insurer filed originating summons pursuant to s 96(3) of Road Transport Act 1987 ('the RTA') for declaration that policy issued was void and unenforceable — Whether application could be properly decided solely based on affidavit evidence — Whether policy was in effect at time of accident — Whether plaintiff had waived its right to void policy — Whether granting of declaration would be contrary to intention of RTA — Whether plaintiff's own omissions or carelessness ought to prevent it from obtaining declaration — Whether s 96(3) of RTA should be interpreted to allow plaintiff's application — Road Transport Act 1987 s 96(3)

On 23 December 2022, a road traffic accident occurred involving a motor car and a motorcycle. The motor car was owned by the first defendant and was being driven by the second defendant at the material time while the third defendant was riding the motorcycle. On the same day of the accident, the first defendant obtained an insurance policy ('the policy') from the plaintiff ie Etiqa General Takaful Bhd ('Etiqa') for the motor car. The policy was issued at 3.49pm on 23 December 2022. The third and second defendants made police reports stating that the accident had occurred at 3.45pm and 2.47pm respectively. Etiqa appointed an adjuster to investigate the circumstances of the accident and the adjuster obtained photographs from both the second and third defendants. The photographs of the motorcycle and the third defendant's injuries showed a timestamp of 2.45pm and 3.32pm respectively. Subsequently, the third defendant filed a civil action against the first and second defendants. Etiqa then filed an originating summons seeking declarations that the policy was void and unenforceable in relation to the accident and that Etiqa was not liable to satisfy any claims arising from the accident. The application that was made pursuant to s 96(3) of Road Transport Act 1987 ('the RTA') was grounded on the contention that the insurance policy was purchased after the accident had already occurred. The third defendant submitted that: (a) where no specific time was stated in the certificate for commencement of coverage, the policy took effect from midnight of the start date (23 December 2022) regardless of what time it was purchased; (b) under the Financial Services Act 2013 ('the FSA'), the burden was on the insurer to

make proper inquiries when issuing a policy and the plaintiff's failure to do so amounted to a waiver of its right to void the policy; (c) there were disputed facts which could not be properly resolved through affidavit evidence in originating summons proceedings; and (d) voiding the policy would prejudice an innocent third party contrary to the social protection aims of the RTA. The issues for determination were: (i) whether the application could be properly decided solely based on affidavit evidence; (ii) whether the policy was in effect at the time of the accident; (iii) whether Etiqa had waived its right to void the policy; (iv) whether the granting of the declaration would be contrary to the intention of the RTA; (v) whether Etiqa's own omissions or carelessness ought to prevent it from obtaining the declaration; and (vi) whether s 96(3) of the RTA should be interpreted to allow Etiqa's application.

Held, allowing the application:

(1) There were contemporaneous documentary evidence establishing the critical timeline. The first and second defendants' testimony could not alter these objective facts about timing. The policy was purchased after the accident occurred. The documentary evidence conclusively established the sequence of events, making this suitable for determination by originating summons. To require a full trial would be an unnecessary formality where the essential facts were already irrefutably proven by contemporaneous records (see paras 23–24).

(2) The specification of both date and time (3.49pm on 23 December 2022) in the certificate created a 'special contract' where coverage commenced at that precise time. Since all available evidence placed the accident before 3.49pm, it necessarily occurred outside the period of coverage. Therefore, the policy took effect at 3.49pm on 23 December 2022, after the accident had already occurred (see paras 36 & 39).

(3) The relevant provisions in the FSA did not go so far as to impose a strict liability on the insurer for failing to ask specific questions. There was no evidence that Etiqa was put on inquiry that an accident had already occurred earlier that day. Without any basis for suspicion, it would be unreasonable to expect Etiqa to routinely ask each and every proposer about same-day accidents before issuing a policy. Etiqa was entitled to rely on the first defendant's implied representation that the vehicle was not tainted by any prior mishaps. There was no reasonable opportunity for Etiqa to discover the accident through routine inquiry. The first defendant's failure to disclose such a material fact struck at the root of the insurance contract and could not be excused by the insurer's failure to specifically ask about it. As such, Etiqa had not waived its entitlement to avoid the policy for pre-contractual non-disclosure, and its omission to ask about a pre-existing accident did not preclude the present application to void the policy under s 96(3) of the RTA (see paras 46–47 & 50–51).

(4) The interest of third parties could not override the clear language and effect of the contract between Etiqa and the first defendant. While the RTA did have a salutary aim of facilitating the recovery of accident claims, it did not compel an insurer to underwrite a risk that it did not agree to bear. Etiqa was seeking this declaration under s 96(3) of the RTA, which specifically empowered an insurer to obtain such court order to invalidate a policy, before any judgment on liability had been entered. The existence of this provision demonstrated that Parliament did envision situations where an insurer's contractual rights would take precedence over a third-party claimant. In any event, voiding this policy would not leave the third defendant without any remedy, as he would still have an avenue to pursue his claim directly against the first and/or second defendant as the culpable tortfeasor(s). Therefore, granting Etiqa's application would not run counter to the underlying objectives of the RTA (see paras 53–56).

(5) Etiqa was not under any obligation to play detective and press the first defendant for details of an accident it was unaware of. There was nothing to suggest that Etiqa was careless in processing the policy. The first defendant as the party seeking coverage had the responsibility of making a clean breast of all material facts within his knowledge. He could not now blame Etiqa for taking him at his word and issuing the policy without deeper investigations. Accordingly, there was no remissness or lack of due care on Etiqa's part that would disentitle it from the declaratory relief (see paras 58–60).

(6) Section 96(3) of the RTA served as a crucial mechanism for insurers to challenge policy validity before they become statutorily bound to satisfy any judgment under s 96(1) of the RTA. While s 96(1) o the RTA ensured claimants could recover from insurers once judgment was obtained, s 96(3) of the RTA provided insurers a window to contest clearly void policies before that liability crystallises. Therefore, s 96(3) of the RTA permitted Etiqa to seek these declarations at this stage, prior to any judgment being entered in the sessions court proceedings (see paras 64 & 66–67).

[Bahasa Malaysia summary

Pada 23 Disember 2022, berlaku satu kemalangan jalan raya yang melibatkan sebuah kereta dan sebuah motosikal. Kereta tersebut dimiliki oleh defendan pertama dan dipandu oleh defendan kedua pada masa kejadian, manakala defendan ketiga menunggang motosikal tersebut. Pada hari yang sama dengan kemalangan itu, defendan pertama telah memperoleh satu polisi insurans ('polisi'), daripada plaintif iaitu Etiqa General Takaful Bhd ('Etiqa'), untuk kereta tersebut. Polisi itu dikeluarkan pada pukul 3.49 petang pada 23 Disember 2022. Defendan ketiga dan kedua telah membuat laporan polis masing-masing menyatakan bahawa kemalangan berlaku pada pukul

3.45 petang dan 2.47 petang. Etiqa melantik seorang pelaras untuk menyiasat keadaan kemalangan dan pelaras tersebut mendapatkan gambar daripada defendan kedua dan ketiga. Gambar motosikal dan kecederaan defendan ketiga menunjukkan cap masa masing-masing pada 2.45 petang dan 3.32 petang. Kemudian, defendan ketiga memfailkan tindakan sivil terhadap defendan pertama dan kedua. Etiqa kemudiannya memfailkan saman pemula memohon pengisytiharan bahawa polisi adalah batal dan tidak boleh dikuatkuasakan berhubung kemalangan tersebut dan bahawa Etiqa tidak bertanggungjawab untuk memenuhi sebarang tuntutan yang timbul daripada kemalangan tersebut. Permohonan yang dibuat berdasarkan s 96(3) Akta Pengangkutan Jalan 1987 ('APJ') ini berlandaskan kepada dakwaan bahawa polisi insurans dibeli selepas kemalangan sudah berlaku. Defendan ketiga berhujah bahawa: (a) jika tiada masa tertentu dinyatakan dalam sijil untuk mula perlindungan, polisi berkuat kuasa mulai tengah malam hari (23 Disember 2022) tanpa mengira masa pembelian; (b) di bawah Akta Perkhidmatan Kewangan 2013 ('APK'), beban tanggungjawab adalah di atas penanggung insurans untuk membuat siasatan yang sewajarnya semasa mengeluarkan polisi dan kegagalan plaintif berbuat demikian dianggap sebagai pengabaian haknya untuk membatalkan polisi; (c) terdapat fakta yang dipertikaikan yang tidak dapat diselesaikan dengan sewajarnya melalui afidavit dalam prosiding saman pemula; dan (d) pembatalan polisi akan menjejaskan pihak ketiga yang tidak bersalah bertentangan dengan matlamat perlindungan sosial APJ. Isu-isu untuk pertimbangan adalah: (i) sama ada permohonan boleh diputuskan dengan betul hanya berdasarkan keterangan afidavit; (ii) sama ada polisi berkuat kuasa pada masa kemalangan; (iii) sama ada Etiqa telah mengabaikan haknya untuk membatalkan polisi; (iv) sama ada pengisytiharan tersebut bertentangan dengan niat APJ; (v) sama ada peninggalan atau kecuaian Etiqa sendiri patut menghalangnya daripada mendapatkan pengisytiharan; dan (vi) sama ada s 96(3) APJ harus ditafsirkan untuk membenarkan permohonan Etiqa.

Diputuskan, membenarkan permohonan:

(1) Terdapat keterangan dokumentari semasa yang menunjukkan garis masa penting tersebut. Keterangan defendan pertama dan kedua tidak dapat mengubah fakta objektif mengenai masa tersebut. Polisi tersebut dibeli selepas kemalangan berlaku. Keterangan bertulis secara jelas membuktikan urutan kejadian, menjadikan perkara ini sesuai untuk diputuskan melalui saman pemula. Mengadakan perbicaraan penuh akan menjadi satu formaliti yang tidak perlu jika fakta-fakta utama sudah tidak dapat dipertikaikan oleh rekod semasa (lihat perenggan 23–24).

(2) Spesifikasi kedua-dua tarikh dan masa (3.49 petang pada 23 Disember 2022) dalam sijil mencipta 'kontrak khas' di mana perlindungan bermula tepat pada masa tersebut. Oleh kerana semua keterangan yang ada menunjukkan kemalangan berlaku sebelum pukul 3.49 petang,

kemalangan tersebut secara tidak langsung berlaku di luar tempoh perlindungan. Oleh itu, polisi berkuat kuasa mulai pukul 3.49 petang pada 23 Disember 2022, selepas kemalangan telah berlaku (lihat perenggan 36 & 39).

(3) Peruntukan berkaitan dalam APK tidak sampai ke tahap mengenakan liabiliti ketat ke atas penanggung insurans jika gagal bertanya soalan tertentu. Tiada keterangan bahawa Etiqa harus menyiasat tentang kemalangan yang sudah berlaku lebih awal hari tersebut. Tanpa asas untuk syak wasangka, adalah tidak munasabah untuk mengharapkan Etiqa secara rutin bertanya kepada setiap pemohon mengenai kemalangan pada hari yang sama sebelum mengeluarkan polisi. Etiqa berhak bergantung kepada perwakilan tersirat daripada defendan pertama bahawa kenderaan tersebut tidak terlibat dalam sebarang kejadian sebelum ini. Tiada peluang yang munasabah untuk Etiqa mengetahui tentang kemalangan tersebut melalui siasatan rutin. Kegagalan defendan pertama untuk mendedahkan fakta material tersebut melibatkan asas kontrak insurans dan tidak boleh dipadamkan dengan kegagalan penanggung insurans untuk bertanya secara khusus mengenainya. Oleh itu, Etiqa tidak mengetepikan haknya untuk membatalkan polisi kerana tidak mendedahkan maklumat sebelum kontrak, dan kegagalannya bertanya tentang kemalangan sebelum ini tidak menghalang permohonan untuk membatalkan polisi di bawah s 96(3) APJ (lihat perenggan 46–47 & 50–51).

(4) Kepentingan ketiga tidak dapat mengatasi bahasa dan kesan yang jelas dalam kontrak antara Etiqa dan defendan pertama. Walaupun APJ mempunyai matlamat untuk memudahkan pemulihan tuntutan kemalangan, ia tidak memaksa penanggung insurans untuk meliputi risiko yang tidak dipersetujui. Etiqa memohon pengisytiharan tersebut di bawah s 96(3) APJ, yang secara khusus membenarkan penanggung insurans mendapatkan perintah mahkamah untuk membatalkan polisi tersebut sebelum sebarang penghakiman terhadap liabiliti dibuat. Peruntukan ini menunjukkan bahawa Parlimen memang membayangkan situasi di mana hak kontrak penanggung insurans akan diutamakan berbanding tuntutan pihak ketiga. Selain itu, membatalkan polisi ini tidak akan meninggalkan defendan ketiga tanpa sebarang jalan penyelesaian, kerana dia masih boleh menuntut secara langsung terhadap defendan pertama dan/atau kedua sebagai pihak yang bertanggungjawab. Oleh itu, permohonan Etiqa tidak akan bertentangan dengan objektif utama APJ (lihat perenggan 53–56).

(5) Etiqa tidak berkewajipan menjadi detektif dan menekan defendan pertama untuk mendapatkan maklumat tentang kemalangan yang tidak diketahui. Tiada apa-apa yang menunjukkan bahawa Etiqa cuai dalam memproses polisi. Defendan pertama sebagai pihak yang memohon

perlindungan mempunyai tanggungjawab untuk mendedahkan semua fakta penting yang dalam pengetahuannya. Dia tidak boleh menyalahkan Etiqa atas kepercayaannya dan pengeluaran polisi tanpa penyiasatan mendalam. Oleh itu, tiada kecuaian atau kekurangan penjagaan daripada pihak Etiqa yang boleh menyebabkan ia tidak berhak kepada pengisytiharan tersebut (lihat perenggan 58–60).

(6) Seksyen 96(3) APJ berfungsi sebagai mekanisme penting bagi penanggung insurans untuk mencabar keberkesanan polisi sebelum mereka terikat secara statutori untuk memenuhi sebarang keputusan mahkamah di bawah s 96(1) APJ. Sementara s 96(1) APJ memastikan penuntut dapat mendapatkan ganti rugi daripada penanggung insurans setelah memperoleh keputusan mahkamah, s 96(3) APJ membekalkan peluang kepada penanggung insurans untuk membantah polisi yang secara jelas adalah batal sebelum liabiliti tersebut menjadi muktamad. Oleh itu, s 96(3) APJ membenarkan Etiqa untuk mendapatkan pengisytiharan tersebut pada tahap ini, sebelum sebarang penghakiman dimasukkan di prosiding mahkamah sesyen (lihat perenggan 64 & 66–67).]

Cases referred to

Allianz General Insurance Company (M) Bhd v Malim Shahrizal bin Abdul Wahab & Anor [2021] MLJU 1919, HC (refd)

Aqmal bin Dakhirrudin v Azhar bin Ahmad & Anor [2019] MLJU 1554; [2019] 1 LNS 492, CA (distd)

Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd [2019] MLJU 2172; [2020] 1 CLJ 476, CA (distd)

Hameed Jagubar bin Syed Ahmad v Pacific & Orient Insurance Co Bhd [2017] 6 MLJ 618; [2017] 10 CLJ 278, CA (refd)

Kurnia Insurans (Malaysia) Bhd v Personal Representative of Zenol Saad & Ors [2013] MLJU 1653; [2013] 1 LNS 239, HC (folld)

Liberty Insurance Bhd v Muhammad Qairul Jafnie bin Abdul Rani & Anor [2024] MLJU 482, HC (refd)

Mohd Faiz bin Zulkifli & Anor v Etiqa Takaful Berhad [2016] MLJU 254; [2016] 5 CLJ 679, HC (folld)

Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad [2018] 12 MLJ 1, FC (folld)

Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 212, SC (refd)

Legislation referred to

Financial Services Act 2013 Schedule 9, paras 5(5), (6), (9)
Road Transport Act 1987 s 96(1), (3)

Sean Denis (Jayadeep Hari & Jamil) for the plaintiff.
S Ganesh a/l M Subramaniam (Abdul Rahim & Co) for the third defendant.

Atan Mustaffa J:

[1] Before the court is an application by an insurance company under s 96(3) of the Road Transport Act 1987 for declarations that a motor insurance policy is void and unenforceable in relation to a road accident, and that the insurer bears no liability for claims arising from that accident. The core issue is whether the policy, which was purchased on the same day as the accident, had come into effect at the time the accident occurred, with the evidence suggesting the policy was issued at 3.49pm while the accident took place earlier that afternoon. Central to the court's determination are questions about when insurance coverage commences when both issuance and accident occur on the same day, whether the insurer waived its rights by not making specific inquiries before issuing the policy, and whether voiding the policy would undermine the protective purpose of the Road Transport Act 1987.

BACKGROUND FACTS

[2] On 23 December 2022, a road traffic accident occurred involving a motor car bearing registration number WXE 6746 and a motorcycle bearing registration number BQU 1570. The motor car was owned by the first defendant, Mohd Khairul Irman bin Mohd Zin, and was being driven by the second defendant, Nurul Azera bt Ahmad, at the material time. The motorcycle was being ridden by the third defendant, Mohamad Afiq bin Ahmad.

[3] On the same day, 23 December 2022, the first defendant obtained an insurance policy (Policy No 85606544) from the plaintiff, Etiqa General Takaful Bhd ('Etiqa') for the motor car WXE 6746. The Certificate of Takaful and Schedule indicated the period of coverage as being from 23 December 2022 to 22 December 2023. The policy was issued at 3.49pm on 23 December 2022.

[4] On 27 December 2022 at 12.52pm, the third defendant made a police report (Report No Shah Alam/035235/22) stating that the accident had occurred on 23 December 2022 at approximately 3.45pm.

[5] Later on the same day, 27 December 2022, at 5.32pm, the second defendant made her first police report (Report No Shah Alam/035267/22) also stating that the accident had occurred on 23 December 2022 at approximately 3.45pm.

[6] Subsequently, on 27 December 2022 at 6.11pm, the second defendant made a correction police report (Report No Shah Alam/035269/22) amending the time of the accident to 2.47pm on 23 December 2022.

[7] Etiqa appointed an adjuster to investigate the circumstances of the accident. During the investigation, the adjuster obtained photographs from both the second and third defendants. Two photographs of motorcycle BQU 1570 shared via WhatsApp by the second defendant showed a timestamp of 2.45pm on 23 December 2022. Additionally, two photographs showing the third defendant's injuries, shared via WhatsApp by the third defendant, displayed a timestamp of 3.32pm on 23 December 2022.

[8] Subsequently, the third defendant filed a civil action against the first and second defendants under suit number BA-A73KJ-672–07 of 2023.

[9] Etiqa then filed an originating summons seeking declarations that Policy No 85606544 was void and unenforceable in relation to the accident that occurred on 23 December 2022, and that Etiqa was not liable to satisfy any claims arising from the accident.

[10] These proceedings were heard before the High Court, with Mr Sean Denis appearing for Etiqa and Mr S Ganesh appearing for the third defendant. The first and second defendants did not appear at the hearing despite being served with notice.

THE PLAINTIFF'S APPLICATION

[11] Etiqa filed an originating summons seeking the following declarations:

(a) an extension of time (if necessary) to file the originating summons;

(b) that Policy No 85606544 covering motor car WXE 6746 for the period 23 December 2022 to 22 December 2023 was void and unenforceable in relation to the accident that occurred on 23 December 2022 involving motor car WXE 6746 and motorcycle BQU 1570;

(c) that Etiqa was not liable to bear any claims arising from the said accident;

(d) any further orders or directions deemed appropriate by the court; and

(e) costs.

[12] The aplication was grounded on the contention that the insurance policy was purchased after the accident had already occurred. Etiqa argued that the policy was issued at 3.49pm on 23 December 2022, whereas according to the police reports and photographic evidence, the accident had occurred earlier

that day — either at 2.47pm according to the second defendant's correction report, or at 3.45pm according to the original reports. Etiqa contended that the first defendant had failed to disclose the accident when purchasing the policy, which amounted to non-disclosure of material facts and/or misrepresentation that vitiated the insurance contract. The application was made pursuant to s 96(3) of the Road Transport Act 1987 ('the RTA 1987'), which allows insurers to obtain declarations voiding insurance policies before any judgment is obtained against the insured.

PARTIES' SUBMISSIONS

[13] The plaintiff submitted that the insurance policy only took effect from the specific time it was issued at 3.49pm on 23 December 2022, and therefore did not cover the accident which occurred earlier that day. The plaintiff argued that the principle of utmost good faith required the first defendant to disclose the accident when purchasing the policy, and his failure to do so rendered the policy void. The plaintiff contended that the timestamp on the issuance document created a 'special contract' determining when coverage began, and that no insurance company would knowingly provide coverage for an accident that had already occurred. The plaintiff also emphasised that under the Financial Services Act 2013 ('the FSA'), insurers cannot assume risk until premium is paid.

[14] The third defendant submitted that where no specific time is stated in the Certificate of Takaful or Schedule for commencement of coverage, the policy takes effect from midnight of the start date (23 December 2022) regardless of what time it was purchased. He argued that both the Certificate of Takaful and Schedule only specified dates without times, stating the period as '23/12/2022 to 22/12/2023'. The third defendant further contended that under the FSA, the burden was on the insurer to make proper enquiries when issuing a policy, and the plaintiff's failure to do so amounted to a waiver of its right to void the policy. He also argued that there were disputed facts which could not be properly resolved through affidavit evidence in originating summons proceedings, and that voiding the policy would prejudice an innocent third party contrary to the social protection aims of the RTA 1987.

ANALYSIS AND FINDINGS OF THE COURT

Whether the application can be properly decided based solely on affidavit evidence

[15] Mr Ganesh submitted that the originating summons should be dismissed as the insurance contract was never exhibited, and there are disputed facts which cannot be resolved via affidavit evidence alone without oral testimony and cross-examination.

[16] He relied heavily on *Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd* [2019] MLJU 2172; [2020] 1 CLJ 476 (CA), where Mary Lim JCA (as she then was) held that 'given the nature of the issue, its determination by way of an exchange of affidavits and with the critical parties not before the court was not appropriate'. Her Ladyship emphasised that 'the circumstances and conditions surrounding the renewal are clearly beyond the capacity and remit of the appellant to address let alone answer. Hence, such applications ought not to be dealt with in the manner done, especially where the relevant and necessary parties are not before the court'.

[17] Mr Ganesh also cited *Aqmal bin Dakhirrudin v Azhar bin Ahmad & Anor* [2019] MLJU 1554; [2019] 1 LNS 492 (CA), where the Court of Appeal adopted the Supreme Court's position in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 212 that:

> the conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings begun by originating summons. In any case, it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence.

[18] In response, learned counsel for Etiqa, Mr Sean Denis, submitted that the material before the court is sufficient to decide the originating summons. He pointed to the Certificate of Takaful and Schedule (exh CSY1) which are the operative documents evidencing the coverage period.

[19] While I acknowledge the force of the principles in *Balamoney Asoriah* and *Aqmal Dakhirrudin*, I find those cases distinguishable on their facts. In *Balamoney*, the core issue was whether there was misrepresentation in the renewal of the policy after the insured's death — a matter that clearly required input from the parties involved in that renewal. As Mary Lim JCA noted, this involved 'questions of mixed fact and law' concerning 'the circumstances as to how or when the insurance policy was actually renewed'.

[20] Similarly, in *Aqmal Dakhirrudin*, the dispute centered on an alleged transfer of interest in the insured vehicle, which the Court of Appeal held 'could only be properly and satisfactorily resolved if oral evidence was adduced'. The court emphasised that where 'the facts are disputed and contradicting to the contemporaneous documents' the matter was unsuitable for determination by originating summons.

[21] The present case is materially different. The key issue here is not about the circumstances of obtaining the policy or any disputed transfer of interest. Rather, it turns on two straightforward questions:

(a) when was the policy issued? This is conclusively answered by the Certificate of Takaful showing 3.49pm on 23 December 2022; and

(b) when did the accident occur? Even taking the third defendant's own version in his police report that it happened at 3.45pm, this precedes the policy issuance.

[22] Unlike *Balamoney* and *Aqmal Dakhirrudin* where oral evidence was needed to resolve factual controversies about the parties' conduct, here we have contemporaneous documentary evidence establishing the critical timeline. The first and second defendants' testimony cannot alter these objective facts about timing.

[23] Moreover, while in *Balamoney* the policy's validity turned on the insurer's own conduct in renewing it after the insured's death, here the simple chronological sequence shows the policy was purchased after the accident occurred. This is not a matter requiring extensive factual inquiry — it is apparent from the documents themselves.

[24] Therefore, while I fully accept the principles in *Balamoney* and *Aqmal Dakhirrudin* that disputed facts generally require oral evidence, I find this case exceptional. The documentary evidence conclusively establishes the sequence of events, making this suitable for determination by originating summons. To require a full trial would be an unnecessary formality where the essential facts are already irrefutably proven by contemporaneous records.

Whether the insurance policy was in effect at the time of the accident

[25] The central issue before this court is whether Policy No 85606544 issued by Etiqa was in force at the time of the accident on 23 December 2022. While it is undisputed that both events occurred on the same day, there is significant controversy over the precise time at which the policy came into effect.

[26] The starting point of analysis must be the Federal Court's authoritative pronouncement in *Pacific & Orient Insurance Co Bhd v Hameed Jagubar bin Syed Ahmad* [2018] 12 MLJ 1. In that landmark decision, the Federal Court considered nearly identical circumstances where an accident and policy issuance occurred on the same day but at different times. The Federal Court's analysis provides the governing principles for resolving such disputes.

[27] First, the Federal Court established that where both date and time of issuance are specified in the insurance documentation, this constitutes what the court termed a 'special contract'. As Aziah Ali FCJ explained at para 40:

A Adopting the approach taken by the Supreme Court of India, we find that the policy under consideration in this appeal where the date and time of issue are mentioned in the cover note is a 'special contract'.

B **[28]** This classification as a 'special contract' is legally significant because it determines how policy commencement is to be interpreted. The Federal Court held unequivocally at para 41:

> Our answer to the first question is that an insurance policy will take effect from the time of issuance of cover.

C

[29] Mr Ganesh, appearing for the third defendant, contended that since neither the Certificate of Takaful nor the Schedule explicitly states a commencement time, the policy should be deemed to take effect from midnight of 23 December 2022 by default. He relied primarily on the Court of D Appeal's decision in *Hameed Jagubar bin Syed Ahmad v Pacific & Orient Insurance Co Bhd* [2017] 6 MLJ 618; [2017] 10 CLJ 278.

[30] However, this argument faces two insurmountable difficulties. First, the Court of Appeal decision relied upon was explicitly overturned by the Federal E Court in *Pacific & Orient Insurance* [2018]. The Federal Court rejected the very midnight default rule that Mr Ganesh seeks to invoke.

[31] Second, and more fundamentally, the premise of Mr Ganesh's argument — that no specific time is stated — is incorrect when the insurance F documentation is read as a whole. The Certificate of Takaful clearly records issuance at 3.49pm on 23 December 2022. Following *Pacific & Orient Insurance*, this specification of both date and time creates a 'special contract' where coverage commences at the stated time of issuance.

G **[32]** This interpretation is reinforced by the Federal Court's emphasis in *Pacific & Orient Insurance* on the integral connection between premium payment and risk assumption. As Aziah Ali FCJ observed at para 29:

> Insurance is a contract based upon speculation ... Like any contract, an insurance H contract requires the elements of offer, acceptance and consideration ... Under the contract, the insurer assumes his obligation to the insured in return for a money consideration, called the premium.

[33] The Federal Court further noted at para 31 that:

I > The cover note is in itself a contract of insurance, governing the rights and liabilities of the parties in the event of a loss taking place during its currency.

[34] The Federal Court's approach has been consistently applied by the High Courts. In *Allianz General Insurance Company (M) Bhd v Malim Shahrizal*

bin Abdul Wahab & Anor [2021] MLJU 1919, *Liberty Insurance Bhd v Muhammad Qairul Jafnie bin Abdul Rani & Anor* [2024] MLJU 482, and several other decisions, the courts have upheld the stated issuance time as determinative of when coverage begins, even where that time appears only in the certificate/cover note and not in the policy schedule.

[35] In this case, the evidence establishes that:

(a) the Certificate of Takaful specifies issuance at 3.49pm on 23 December 2022;

(b) photos submitted by the second defendant were time-stamped at 2.45pm;

(c) the third defendant's own police report states the accident occurred around 3.45pm; and

(d) the second defendant initially reported the accident time as 3.45pm before amending it to 2.47pm

[36] Following the Federal Court decision in *Pacific & Orient Insurance*, the specification of both date and time (3.49pm on 23 December 2022) in the Certificate creates a 'special contract' where coverage commenced at that precise time. Since all available evidence places the accident before 3.49pm, it necessarily occurred outside the period of coverage.

[37] This conclusion aligns with both legal principle and commercial reality. As the Federal Court emphasised in *Pacific & Orient Insurance* at para 29, insurance is fundamentally a contract of speculation regarding future uncertainties. It would be commercially nonsensical, and legally problematic, to interpret an insurance contract as covering an accident that had already occurred before the contract's formation.

[38] The evidence of photography timestamps and police reports showing the accident's earlier occurrence serves to reinforce this legal analysis, though it is not strictly necessary to the outcome. The specification of 3.49pm as the issuance time is itself sufficient under *Pacific & Orient Insurance* to establish that as the commencement of coverage.

[39] Based on the Federal Court's binding authority in *Pacific & Orient Insurance* and the clear evidence before this court, I find that Policy No 85606544 took effect at 3.49pm on 23 December 2022, after the accident had already occurred.

Whether Etiqa (insurer) has waived its right to void the policy

[40] Mr Ganesh argued that pursuant to Schedule 9 of the FSA, Etiqa had a duty to inquire with the first defendant about any accidents that had occurred on the inception date of the policy ie 23 December 2022. The relevant provisions of Schedule 9 state:

> 5(1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.
>
> ...
>
> 5(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.'

[41] Based on these provisions, Mr Ganesh submitted that by failing to pose specific questions about accidents on the inception date, Etiqa is deemed to have waived its right to complain about non-disclosure by the first defendant.

[42] Mr Ganesh further relied on sub-para 5(9) of Schedule 9 which provides:

> Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[43] He submitted that this provision has modified the traditional common law duty of utmost good faith, which is no longer solely imposed on the insured. Instead, the insurer is also obligated to take proactive steps to obtain all material information before underwriting the risk. Failure to do so would prevent the insurer from seeking a declaration to void the policy under s 96(3) of the RTA 1987. Section 96(3) reads:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

[44] In response, Mr Denis contended that there is nothing in the pleaded case to show that Etiqa was aware of a potential accident and neglected to investigate further. The duty to disclose still lay with the first defendant, who should have informed Etiqa of the accident before procuring the policy on the same day. Without such disclosure, Etiqa should not be faulted for issuing the policy in ignorance of the accident.

[45] Mr Denis relied on the case of *Pacific & Orient Insurance Co Bhd*

v Hameed Jagubar bin Syed Ahmad where the Federal Court held at para [35]:

> The duty of disclosure is provided under s 150(1) of Act 553 which states as follows:
>
> 150(1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that —
>
> (a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or
>
> (b) a reasonable person in the circumstances could be expected to know to be relevant.

[46] I have considered the relevant provisions in the FSA and find that they do not go so far as to impose a strict liability on the insurer for failing to ask specific questions. While Schedule 9 does spell out situations where the insured's duty of disclosure may be waived under paras 5(5) and 5(6), these provisions must be read purposively and in context.

[47] There is no evidence that Etiqa was put on inquiry that an accident had already occurred earlier that day. Without any basis for suspicion, I agree with Mr Denis that it would be unreasonable to expect Etiqa to routinely ask each and every proposer about same-day accidents before issuing a policy. Etiqa was entitled to rely on the first defendant's implied representation that the vehicle was not tainted by any prior mishaps.

[48] This interpretation is supported by the Court of Appeal's decision in *Balamoney Asoriah* which held at para [35] that 'The new statutory regime recognises in sub-para 5(9) the mutual duty of utmost good faith or uberrimae fidei that was owed at all times by both parties to the insurance contract'. The key word is 'mutual' — both parties must act in good faith. It would be contrary to this principle and also public policy and common sense to allow an insured to suppress material facts and profit from such non-disclosure, in the hope that the insurer's lack of clairvoyance or targeted probing would be construed as a waiver. The reciprocal duty of utmost good faith and the spirit of the FSA militate against such an interpretation.

[49] Further support can be found in *Mohd Faiz bin Zulkifli & Anor v Etiqa Takaful Berhad* [2016] MLJU 254; [2016] 5 CLJ 679 where the High Court held that the non-disclosure of a prior accident would amount to fraud sufficient to void the policy, if the insured person failed to disclose the true facts when specifically asked. However, the court also recognised that if the insurer's agent had not made any inquiry despite the opportunity to do so, this omission would constitute a waiver of the right to information.

[50] Having regard to all the authorities, I find that the present case is distinguishable. Here, there was no reasonable opportunity for Etiqa to

discover the accident through routine inquiry. The first defendant's failure to disclose such a material fact strikes at the root of the insurance contract and cannot be excused by the insurer's failure to specifically ask about it.

[51] As such, I hold that Etiqa has not waived its entitlement to avoid the policy for pre-contractual non-disclosure, and its omission to ask about a pre-existing accident does not preclude the present application to void the policy under s 96(3) of the RTA 1987.

Whether granting the declaration would be contrary to the intention of the RTA 1987

[52] Mr Ganesh urged the court to adopt a purposive interpretation of the RTA 1987 to prioritise the protection of innocent third parties like the third defendant. He submitted that allowing Etiqa to void its liability in these circumstances would undermine the compensatory purpose of the legislative scheme and lead to unfair prejudice against the injured third party.

[53] However, I am of the view that the interest of third parties cannot override the clear language and effect of the contract between Etiqa and the first defendant. While the RTA 1987 does have a salutary aim of facilitating the recovery of accident claims, it does not compel an insurer to underwrite a risk that it did not agree to bear.

[54] It is significant that Etiqa is seeking this declaration under s 96(3) of the RTA 1987, which specifically empowers an insurer to obtain such court order to invalidate a policy, before any judgment on liability has been entered. The existence of this provision demonstrates that Parliament did envision situations where an insurer's contractual rights would take precedence over a third party claimant.

[55] In any event, voiding this policy would not leave the third defendant without any remedy, as he would still have an avenue to pursue his claim directly against the first and/or second defendant as the culpable tortfeasor(s). The third defendant's rights against Etiqa cannot rise higher than that of the first defendant as Etiqa's contractual counterparty. Since the policy itself is void due to the first defendant's non-disclosure, the third defendant also cannot claim the benefit of that vitiated policy.

[56] Therefore, I find that granting Etiqa's present application would not run counter to the underlying objectives of the RTA 1987.

Whether Etiqa's own omissions or carelessness should prevent it from obtaining the declaration

[57] Mr Ganesh argued that Etiqa had not exercised due diligence when underwriting the policy, and should bear the consequences of its failure to elicit the necessary information about the prior accident.

[58] However, as explained above, I do not think Etiqa was under any obligation to play detective and press the first defendant for details of an accident it was unaware of. There is nothing to suggest that Etiqa was careless in processing this policy. The law does not require an insurer to be a mind-reader and expect the worst from each proposer.

[59] The first defendant as the party seeking coverage had the responsibility of making a clean breast of all material facts within his knowledge. He cannot now blame Etiqa for taking him at his word and issuing the policy without deeper investigations.

[60] Accordingly, I am satisfied that there was no remissness or lack of due care on Etiqa's part that would disentitle it from the declaratory relief.

Whether s 96(3) of the RTA 1987 should be interpreted to allow Etiqa's application in these circumstances

[61] Finally, I must address the applicability of s 96(3) of the RTA 1987 to the present case.

[62] Mr Denis highlighted that Etiqa's application was filed before any judgment has been entered on the third defendant's claim. The timing is significant because s 96(3) explicitly states that:

> No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

[63] This interpretation of the statutory timeline is well-supported by case law, particularly *Kurnia Insurans (Malaysia) Bhd v Personal Representative of Zenol Saad & Ors* [2013] MLJU 1653; [2013] 1 LNS 239. In that case, Justice Yeoh Wee Siam addressed a similar scenario where the insurer sought declarations under s 96(3) while proceedings were pending in the sessions court. Her Ladyship observed that the purpose of s 96(3) was to allow insurers to obtain declaratory relief before any decision on liability is made in the main action. As she noted:

> The sessions court case has not been heard or decided yet. The applicant is endeavouring to obtain the declaratory reliefs sought in this application before the decision of the sessions court is given on the liability of R2, if any, to R3 and R4. It is clear that the applicant is avoiding any liability of R2 to R3 and R4 which may be enforceable by R3 and R4, as third party, against the insurer under s 96(1) of the

RTA.

[64] The reasoning in *Kurnia* demonstrates that s 96(3) serves as a crucial mechanism for insurers to challenge policy validity before they become statutorily bound to satisfy any judgment under s 96(1). Section 96(1) imposes a broad obligation on insurers to honour judgments against their insured parties 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy'. However, s 96(3) carves out an important exception — allowing insurers to obtain declarations voiding policies before judgment is entered, thereby preempting the s 96(1) obligation.

[65] The High Court in *Kurnia* proceeded to grant the declarations sought despite the pending sessions court trial, recognising that s 96(3) applications need not await the outcome of the main liability proceedings. This precedent directly supports Etiqa's right to bring the present application at this juncture.

[66] Moreover, I note that this interpretation aligns with the statutory scheme's balance between protecting third party claimants and preserving insurers' rights to challenge policy validity on legitimate grounds. While s 96(1) ensures claimants can recover from insurers once judgment is obtained, s 96(3) provides insurers a window to contest clearly void policies before that liability crystallises.

[67] Therefore, as a matter of statutory construction reinforced by binding precedent, I am satisfied that s 96(3) permits Etiqa to seek these declarations at this stage, prior to any judgment being entered in the sessions court proceedings. The potential impact on the injured claimant's prospects of recovery, while unfortunate, cannot override the clear statutory right granted to insurers under s 96(3) when properly invoked within the prescribed timeframe.

CONCLUSION

[68] For all the foregoing reasons, I allow Etiqa's application in full and grant the following orders:

(a) Insurance Policy No 85606544 covering motor vehicle No WXE 6746 for the period 23 December 2022 to 22 December 2023 is void and unenforceable in respect of the road accident that occurred on 23 December 2022 involving motor vehicle No WXE 6746 and motorcycle No BQU 1570;

(b) consequently, the applicant (Etiqa) shall not be liable for any claims arising from the accident between motor vehicle No WXE 6746 and motorcycle No BQU 1570; and

(c) the third respondent shall pay costs of RM2,000 to the applicant.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh